and live in the Imam's room at the mosque was to complainant's knowledge an improper action to take, being repugnant to Islamic custom and that it must meet with disapproval of the mosque caretaker. Whether or not the action of the complainant was in fact contrary to Islamic custom I do not know and I express no opinion upon the point. It may well be so but such customs must be proved.

I think the learned Magistrate has confused matters put to a witness in cross-examination and submissions made by Counsel with evidence. He appears to have overlooked the fact that upon the evidence given the accused was the caretaker of the mosque and was employed by the complainant.

The provisions of section 74 of the Criminal Procedure Code are useful provisions, but in my opinion should only be used in cases where it is clear that upon the evidence given unless restrained the complainant is likely to cause a breach of the peace. In any event an order under this section must be based upon positive evidence and cannot be based upon suggestions put to a witness in cross-examination which that witness repudiates, or upon submissions made by Counsel unsupported by evidence.

For these reasons I came to the conclusion that the learned Magistrate's order was wrong and I, therefore, set it aside.

Order accordingly.

PUBLIC PROSECUTOR v. CHOONG SING

[A. Cr. J. (Thomson J.) August 19, 1955]

[Ipoh — Criminal Appeal No. 6 of 1955]

Common Gaming Houses Ordinance, 1953, s. 4(1)(b) — Amusement Park — Permitting premises to be used as a common gaming house — What constitutes permitting.

This was an appeal by the Public Prosecutor against the acquittal of the respondent, who was the owner of an Amusement Park, on a charge of permitting premises to be used as a common gaming house in contravention of s. 4(1)(b) of the Common Gaming Houses Ordinance. The learned Magistrate in his grounds of judgment said: "It was necessary to shew either that the accused had specifically given permission for the amusement park to be used for gaming or that he was aware that it was being so used and had not stopped it."

Held: to sustain a charge of permitting premises to be used as a common gaming house, it is not necessary to prove actual knowledge in the sense of seeing or knowing by the persons charged. It is enough if there are circumstances from which it may be inferred that he or his servants had connived at what was going on.

Cases referred to :—

(1) *Somerset v. Wade* (1894) 1 Q.B. 574, 576.
(2) *Redgate v. Haynes* (1875–6) 1 Q.B.D. 89, 94.
(3) *Bosley v. Davies* (1875–6) 1 Q.B.D. 84.
(4) *Somerset v. Hart* (1883–4) 12 Q.B.D. 360, 364.
(5) *Bond v. Evans* (1888) 21 Q.B.D. 249, 252.

MAGISTRATE'S CRIMINAL APPEAL.

A. P. Jack (Federal Counsel) for the appellant.

Respondent in person.

Thomson J. (delivering oral judgment) : — The respondent in this case at the material time was the owner of premises described as an Amusement Park and he was prosecuted on a charge of permitting the premises to be used as a common gaming house in contravention of section 4(1)(b) of the Common Gaming Houses Ordinance, 1953. At the same time, six persons in his employment were charged with assisting in the management of a common gaming house in contravention of section 4(1)(c). Quite properly the charge against the accused and against the persons in his employment were tried together. In the event (I do not find it necessary to discuss this part of the case) the learned Magistrate was satisfied that the premises in question did constitute a common gaming house and he proceeded to convict the six persons who were charged with assisting in its management. Against these convictions there has been no appeal.

As regards the respondent, however, he acquitted him and against that Order of acquittal the Public Prosecutor has now appealed.

The only ground of appeal is that the learned Magistrate erred in law in that he applied certain wrong principles to the assessment of the evidence. In discussing the case against the respondent he said that in order to justify a conviction failure to take adequate steps to prevent gaming was not enough to make out the offence charged, and, here I quote his words :—

"It was necessary to shew either that the accused had specifically given permission for the amusement park to be used for gaming or that he was aware that it was being so used and had not stopped it."

On that basis, he proceeded to consider the evidence and came to the conclusion that the respondent should not be convicted.

In my judgment, the learned Magistrate applied an unduly narrow principle in his consideration of the case and one which cannot be supported on authority.

In this connection I would base myself on the English authorities relating to section 17(1) of the Licensing Act, 1872, the material portion of which reads as follows :—

"17(1). If any licensed person suffers any gaming to be carried on on his premises he shall be liable to a penalty."

In that section, it was held by Mathew J. in the case of *Somerset v. Wade*[1] the word "suffers" is not distinguishable from "permits".

First of all I would refer to the case of *Redgate v. Haynes*[2] in which Blackburn J. made the following observations :—

"I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not "suffering" the gaming to be carried on, and if the justices were of a different opinion they were wrong; but I think, if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house, and if those persons connive at the gaming, she is responsible."

Then I take to the case of *Bosley v. Davies*[3] in which it was said that actual knowledge in the sense of seeing or knowing by the party charged is not necessary but there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. "Constructive knowledge will supply the place of actual knowledge."

Then I come to the case of *Somerset v. Hart*[4]. In that case it was said by Lord Coleridge C.J. :—

"I do not say that proof of actual knowledge on the part of the landlord is necessary . . . ."

and then a little later :—

"Where no actual knowledge is shewn there must, as it seems to me, be something to shew either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part, that he might have known but purposely abstained from knowing."

Finally there is the case of *Bond v. Evans*[5] where Manisty J. said :—

"In my opinion it was intended by Section 17 absolutely to prohibit gaming on licensed premises, and that the substantial effect is that the responsibility is thrown upon any person who keeps a licensed house to take proper precautions to prevent all gaming on his premises."

In the present case had the learned Magistrate applied his mind to the evidence in the light of these authorities he might well have come to a different conclusion. Whether he would have done so or not I am not prepared to say on the written notes of evidence. I will accordingly set aside the Order of acquittal and make an Order for a re-trial, though in all the circumstances of the case the Prosecution may not consider it necessary to take the matter any further.

Retrial ordered.

Re SITHAMBARAM CHETTIAR

[O. C. J. (Spenser Wilkinson J.) August 22, 1955]

[Penang — Originating Summons No. 45 of 1955]

Certiorari — Whether order for certiorari will lie to a Collector of Land Revenue acting under the Crown Lands Encroachments Ordinance (Cap. 114).

Land laws — Land gradually and imperceptibly covered by the sea which subsequently recedes leaving it high and dry — Whether such land belongs to the Crown or to the original owner.

This was an application for an order of *Certiorari* to remove into the High Court and quash an order made by the Collector of Land Revenue, Penang, under the Crown Lands Encroachments Ordinance. The applicant was the owner of the land in question which in 1925 adjoined the sea. In the course of some years the sea commenced to encroach upon the land and by about 1933 the whole or at least the major portion of the land was submerged at high water. The sea however then began gradually to retreat again and the whole of it became above the high water mark. In 1954 the Collector of Land Revenue in exercise of the powers conferred on him by s. 9(1) of the Crown Lands Encroachments Ordinance declared by a notice in the Gazette that if the land was not claimed within 6 months from the date of the notice it would be declared to be forfeited to the Crown. The applicant thereupon made a claim to the land. The Collector thereupon held an enquiry and subsequently gave his decision that the claim of the applicant to the land was not valid. He said in his decision: "In my opinion the claimant has failed to establish a claim to the land which by virtue of the imperceptible advance of high water mark over the period 1893 and 1934 became Crown property, and which as far as s. 9(1) of Cap. 114 is concerned had been abandoned by previous owners for upwards of three years." The applicant thereupon applied for an order of *Certiorari*.

Held: (1) the Collector of Land Revenue in considering and rejecting the claim of the applicant was for the purpose of *Certiorari* an inferior tribunal engaged in the exercise of a judicial act; (2) the provisions of the Crown Suits Ordinance did not prevent the Court from exercising the remedy by way of *Certiorari;* (3) the owner of land which becomes gradually and imperceptibly covered by the sea is entitled to regain possession of it if it subsequently becomes high and dry by gradual recession of the water; (4) there was therefore a clear error of law on the face of the written decision given by the Collector of Land Revenue in this case and therefore there must be an order for *Certiorari*.

Cases referred to :—

(1) *G. H. Slot & Co. v. Registrar of Trade Marks* (1939) M.L.J. 276.

(2) *Ex parte Yeo Poh Neo* (1947) M.L.J. 59.

(3) *R. v. Manchester Legal Aid Committee* (1952) 2 Q.B. 413.

(4) *R. v. Postmaster-General* (1928) 1 K.B. 291.

(5) *Errington v. Minister of Health* (1935) 1 K.B. 249.

(6) *Melayu Raya Press Ltd. v. W. L. Blythe* (1951) M.L.J. 89.

(7) *R. v. Metropolitan Police Commissioner* (1953) 2 All E.R. 717.